

EVIDENCE — PRETRIAL IDENTIFICATION — *Dessureault* hearings, in general — Revised 3/2010

In *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), the Arizona Supreme Court dealt with pretrial identification procedures. As the Court has since said, "Unduly suggestive pretrial procedures may unfairly cause a witness to misidentify the defendant, and then to repeat the misidentification at trial." *State v. Smith*, 146 Ariz. 491, 496, 707 P.2d 289, 294 (1985). The Court was concerned that a defendant who was subjected to an unfairly suggestive pretrial identification procedure would be denied due process and thus would not receive a fair trial. In *Dessureault*, the witness described the robber as having a beard and moustache. The police later showed the witness a lineup in which everyone but the defendant was clean-shaven. The Arizona Supreme Court stated that because only one person in the lineup could possibly have been the described robber, "Palpably, the lineup itself had no virtue as a test of [the witness's] ability to discriminate." *Dessureault*, 104 Ariz. at 383, 453 P.2d at 954. The Court recognized that "a lineup does not require individuals of absolute identical dress, size and physical characteristics," because, by definition, since we identify different people by their differences, if it were possible to find several identical people for a lineup, "clearly, identification would be impossible." Still, the Court found the differences in *Dessureault*'s case excessive:

It is the differences which distinguish one individual from another and by which identifications are made, but where the differences are so great that only one person could, within reason, fill the description of the accused, leaving the witness with only one possible choice, the lineup itself becomes significantly suggestive and as such materially increases the dangers inherent in eye witness identification.

Id.

Accordingly, the *Dessureault* Court mandated a three-step process in determining whether a pretrial identification was unduly suggestive so as to taint the proposed in-court identification. This process provides a sufficient record from which the appellate courts can determine whether or not the in-court identification was tainted by prior identification procedures, and, if so, whether the error was harmless or reversible error. *Id.* at 384, 453 P.2d at 955.

As a preliminary matter, to start the *Dessureault* process, the defense must raise a challenge to the in-court identification. "[I]f the in-court identification is not challenged at the trial court level, it will be presumed thereafter that the prior identification procedures did not taint the in-court identification." *Id.* Once the defense has challenged the validity of the proposed in-court identification, there are three steps to the *Dessureault* process:

1. First, "the trial judge must immediately hold a hearing in the absence of the jury to determine from clear and convincing evidence whether [the pretrial identification] contained unduly suggestive circumstances. *Id.* at 384, 453 P.2d at 955. In the *Dessureault* hearing, "the burden is on the prosecution to establish from all the circumstances surrounding the pretrial identification that it was not such as to be unduly suggestive." *Id.*
2. Second, if the trial court finds that the pretrial identification was unduly suggestive, or finds that the prosecution has not met its burden of showing by clear and convincing evidence that it was **not** suggestive, "then it is the prosecution's burden to satisfy the trial judge from clear and convincing evidence that the proposed in-court identification is not tainted by the prior identification." *Id.*
3. Third, if the defense requests a *Dessureault* instruction, the court must instruct the jury that, before returning a guilty verdict, the jury "must be satisfied beyond a reasonable doubt that the in-court identification was independent of the previous pretrial identification;" or, if the jury finds that the in-court identification was not derived from an independent source, the jury must find from other evidence in the case that the defendant is the guilty person beyond a reasonable doubt.

Id. At the second step of the *Dessureault* process, if the trial court decides that the pretrial identification was unduly suggestive, the court must then decide if the identification is reliable in light of the "totality of the circumstances"; if the identification is reliable, using it at trial will not violate the defendant's due process rights. *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *State v. Chapple*, 135 Ariz. 281, 286, 660 P.2d 1208, 1213 (1983); *State v. Fierro*, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990).

In *Dessureault*, the Court stated that the instruction is to be given "if requested." *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. Subsequently, the Court held that no fundamental error occurred when the defendant did not request a *Dessureault* instruction and the court failed to give the instruction *sua sponte*. *State v. Lockett*, 107 Ariz. 598, 600, 491 P.2d 452, 454 (1971).

Although *Dessureault* itself said that the instruction was to be given "if requested," the Arizona courts have subsequently held that the three *Dessureault* requirements are to be followed in sequence. That is, the court must first determine if the pretrial identification was unduly suggestive; the court need not proceed to the other two steps unless the court has first made that finding. Therefore, even if the defense requests a *Dessureault* instruction, the trial court need not give such an instruction unless the court has first determined that an out-of-court identification procedure was unduly suggestive. *State v. Osorio*, 187 Ariz. 579, 582, 931 P.2d 1089, 1092 (App.1996), *review dismissed*, 188 Ariz. 375, 936 P.2d 1269 (1997); *accord*, *State v. Harris*, 23 Ariz.App. 358, 359, 533 P.2d 569, 570 (1975).